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No. _____

In The

Supreme Court of the United States

October Term, 1999

WENDY J. EIMERS,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution to present a defense of her choosing and witnesses in her favor violated by the trial court's preclusion of the testimony of a character witness on the prosecutor's objection that the witness' physical disabilities might create sympathy among the jurors which would prejudice the People's case?

2. Was the character witness' right to equal protection of the law violated when she was denied the right to participate in the criminal justice process simply because a prosecutor feared that her disabilities would create sympathy among the jurors which might prejudice the People's case?

PARENT AND SUBSIDIARY COMPANIES

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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OPINIONS AND ORDERS BELOW

On May 20, 1997 the Chautauqua County (N.Y.) Justice Court, Town of Pomfret, issued a Certificate of Conviction convicting Wendy J. Eimers of the offense of overdriving and injuring animals, and failure to provide proper sustenance in violation of New York's Agriculture and Market Law Section 353. The certificate is reproduced in the Appendix at page A-7. During the trial of this matter, petitioner was barred from presenting the testimony of a character witness on the prosecutor's objection that the witness' physical disabilities might create sympathy among the jurors. The relevant portions of the trial transcript are set forth in the Appendix at pages A-1 through A-2.

After receiving the briefs of the parties (set forth in the Appendix at pages A-8 through A-84) and hearing oral argument, the County Court for the County of Chautauqua, New York, rejected petitioner's arguments that, *inter alia*, her Sixth and Fourteenth Amendment rights to present a defense of her choosing and to present witnesses on her behalf were violated by the trial court's preclusion of the character witness. The Chautauqua County Court also rejected petitioner's argument that the character witness' right to equal protection of the law pursuant to the Fourteenth Amendment was violated when she was precluded from testifying because of her physical disabilities. The order of the County Court is set forth at pages A-3 through A-5 of the Appendix.

On October 1, 1999, the State of New York Court of Appeals issued a certificate denying leave to appeal, holding that there is no question of law presented which ought to be reviewed by the Court of Appeals. The certificate is reproduced in the Appendix at page A-6.

JURISDICTION OF THIS COURT

The order of the New York State Court of Appeals denying petitioner's application for leave to appeal to that Court was filed on October 1, 1999 (A-6). Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 13 of the Rules of this Court, as a final judgment subject to discretionary review reviewed by the highest court of New York in which review could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Article I, Section 6

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury,

shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

New York State Constitution, Article 1, Section 11

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

New York State Agriculture and Markets Law, Section 353 *(in relevant part)*

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animals of necessary

> sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

New York Agriculture and Markets Law, Section 356 *(in relevant part)*

> A person who, having impounded or confined any animal, refuses or neglects to supply to such animal during its confinement a sufficient supply of good and wholesome air, food, shelter and water, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

New York State Civil Rights Law, Section 40-C(2)

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the Penal Law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

New York State Criminal Procedure Law, Section 60.20

> 1. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence.
>
> 2. Every witness more than twelve years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath. If the court is not so satisfied, such child or such witness over twelve years old who cannot, as a result of mental disease or defect, understand the nature of an oath may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.
>
> 3. A defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to subdivision two.

STATEMENT OF THE CASE

This case involves the preclusion of a character witness from testifying at trial due simply to the fact that she is confined to a wheelchair. In doing so, the court denied Wendy J. Eimers, the petitioner, her Sixth Amendment right to present a defense of her choosing and her Fourteenth Amendment right to due process of law. Additionally, in preventing Janet Pulci from exercising her choice to participate in the judicial process as a character witness

because of her disability, the court violated her Fourteenth Amendment right to equal protection.

Mrs. Eimers, a fifty-one year old Jamestown, New York resident and a registered nurse of thirty-one years at the time of trial, is married and has eight children varying from eleven to twenty nine years of age (R-324).[1] Mrs. Eimers began working as a registered nurse after she graduated from Jamestown Community College in 1966. She stopped working in that capacity for about ten years so she would be able to raise her children with her undivided attention. Soon thereafter, her husband became disabled and Mrs. Eimers became the primary breadwinner for her family (R-325).

Because of Mrs. Eimers' love for animals and her desire to care for sick, stray animals, she and her husband constructed a kennel in their backyard. From her home Mrs. Eimers was able to both house dogs that no one else wanted and raise dogs for sale (R-310, 348).

Ms. Holly Loffland, an inspector with the American Kennel Club phoned Mrs. Eimers at her home on July 22, 1996 to inform her that she would be coming to her house the next day to review her records (R-119). Although Mrs. Eimers was unaware that Ms. Loffland was going to do a walk-through of the kennels, she was more than accommodating when Ms. Loffland made her request (R-329).

Ms. Loffland stated that some of the runs in which the dogs were kept had earth floors (R-217). She also stated that some dogs had matted coats (R-218). However, she never testified that these

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[1] Parenthetical references preceded by the letter "R" refer to citations to the Record on Appeal in the state courts.

dogs were injured or lacked proper food or water. In addition, Mrs. Eimers was in full compliance with the AKC record keeping and lineage records.

During their tour of the yard, Mrs. Eimers pointed out to Ms. Loffland some of her concerns with regard to the dogs and she also sought advice (R-331). Specifically, she pointed out that some of the cocker spaniels she had recently purchased were matted because their previous owned never paid proper attention to them (R-331). Mrs. Eimers attempted to remove the matts from the dogs, but they were difficult for her to keep under control (R-332).

Mrs. Eimers also sought Ms. Loffland's expertise with regard to a golden retriever which had a sore on its nose. Ms. Loffland informed Mrs. Eimers that a salve-like substance called Squat could be therapeutic for the golden retriever's nose (R-342). Mrs. Eimers subsequently applied the Squat to the dog's nose to aid in the healing process (R-268). Ms. Loffland never stated that the golden retriever had been abused or lacked food or water.

Another area of the kennel Ms. Loffland inspected was the whelping room, though she remained six feet outside the building during the inspection (R-344). While Ms. Loffland stated that she personally disliked the construction of the cages and the way they were set up, she never stated that any of the dogs in the whelping room were abused or appeared injured.

Ms. Loffland never issued Mrs. Eimers a warning letter indicating that her premises were in violation of any AKC regulations (R-251). In fact, the first report made by Ms. Loffland to a law enforcement agency with regard to the condition of the Eimers' kennel was on September 13, 1996 when she advised that the dogs were being deprived of wholesome air, shelter and water

and essential care needed for basic medical treatment (R-255, 23). Obviously, Ms. Loffland did not feel a sense of urgency in reporting the condition of the kennel because she waited nearly fifty-two days before contacting law enforcement.

Petitioner was arrested and charged with the offense of overdriving, torturing, injuring animals and failing to provide proper sustenance in violation of Section 353 of the New York State Agriculture and Market Laws in the County of Chautauqua on the 23rd of July, 1996 (R-8). She was also charged with the offense of failing to provide proper food and drink to impounded animals in violation of Section 356 of the New York State Agriculture and Markets Law in the County of Chautauqua on the 23rd of July, 1996. At petitioner's arraignment in the Town of Pomfret Justice Court on September 17, 1996, she entered a plea of not guilty (R-8).

At a jury trial held in the Town of Pomfret Justice Court on Monday, May 19, 1997, several witnesses, including petitioner, testified concerning Mrs. Eimers' care of the dogs at her kennel. In addition to petitioner's testimony, defense counsel sought to present the testimony of a character witness, Janet Pulci. The prosecutor objected to Mrs. Eimers' presentation of Ms. Janet Pulci as a character witness on the ground that the jury might be sympathetic to her because of a crippling condition which had confined her to a wheelchair (R-385). Defense counsel, however, emphasized to the Court and the Assistant District Attorney that he intended to call Ms. Pulci as a character witness and that he did not intend to interject anything about her physical condition. In particular, defense counsel explained that Ms. Pulci would have testified as to petitioner's reputation in the community for veracity, truthfulness, kindness and sympathy to the injured and ill-traits obviously relevant to the animal abuse charges lodged against the petitioner (A-1; R-385).

The trial court judge, Honorable David A. Prince, did not allow the witness to testify (A-2; R-386). Subsequently, the jury found Mrs. Eimers guilty of a violation of Section 353 of the Agricultural and Market Laws which prohibits overdriving, injuring or failure to provide proper sustenance to animals. She was sentenced to a probation period of three years with a $1,000 fine and one hundred hours of community service (A-7; R-3).

Petitioner appealed to Chautauqua County Court, State of New York, where she asserted that her conviction should be overruled, arguing; (1) the trial court's decision to preclude Ms. Pulci solely on the basis of her physical disability constituted discrimination on the part of the prosecutor in violation of Ms. Pulci's right to equal protection under the law and (2) the witness preclusion violated Mrs. Eimers' Sixth and Fourteenth Amendment rights to present a defense of her choosing and call witnesses in her favor, as well as a violation of New York State Constitution Article I, Section 6, securing those same rights under New York law. Specifically, petitioner maintained that, where the trial court precluded Ms. Pulci from testifying based solely on the fear that Ms. Pulci's confinement to a wheelchair would elicit a sympathetic response from the jury, Ms. Pulci's Fourteenth Amendment right to equal protection of the law was violated as she was denied the opportunity to voluntarily participate in the activities of government. Further, in denying Ms. Pulci the right to participate in the activities of government and precluding the jury from hearing testimony crucial to its verdict, Mrs. Eimers asserted that the Court also denied her Sixth Amendment right to present a defense of her choosing and witnesses on her behalf, as well as her Fourteenth Amendment right to due process of law (A-8).

The Honorable John T. Ward entered a decision on March 17, 1999 affirming the trial court's decision to preclude Ms. Pulci from testifying as a character witness. The court

reasoned that Mrs. Eimers' reputation for truthfulness and veracity did not relate to any trait involved in the crime charged. Also, her reputation for kindness and sympathy for injured and terminally ill people did not relate to any trait involved in caring for animals. None of these reasons were advanced by the People or the trial court below (A-3).

A timely application for leave to appeal was filed with New York State Court of Appeals wherein the issue of character witness preclusion as a violation of petitioner's Sixth and Fourteenth Amendment rights was raised. Specifically, Mrs. Eimers asserted a violation of her constitutional right to present a defense, including the guarantee to a criminal defendant of the right of compulsory process to call witnesses in her favor. Additionally, Mrs. Eimers contended that the People had violated Ms. Pulci's right to equal protection of the laws under the Fourteenth Amendment. Petitioner renewed her argument that, by precluding Ms. Pulci's testimony solely on the basis of a physical disability, the prosecutor and the trial court violated Ms. Pulci's constitutional right to equal protection by denying her the opportunity to voluntarily participate in the activities of government (A-85). Leave to appeal was denied by Honorable Judith Kaye, Chief Judge of the New York State Court of Appeals (A-6).

POINT I

PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION TO PRESENT A DEFENSE OF HER CHOOSING AND WITNESSES IN HER FAVOR WERE VIOLATED BY THE TRIAL COURT'S PRECLUSION OF THE TESTIMONY OF A CHARACTER WITNESS ON THE PROSECUTOR'S OBJECTION THAT THE WITNESS' PHYSICAL DISABILITIES MIGHT CREATE SYMPATHY AMONG THE JURORS WHICH MIGHT PREJUDICE THE PEOPLE'S CASE

The prosecutor for Chautauqua County, New York, successfully moved to preclude Ms. Janet Pulci as a character witness for petitioner simply because Ms. Pulci is a terminally ill paraplegic with advanced multiple sclerosis (385). Had Ms. Pulci been permitted to testify, she would have informed the jury that petitioner's reputation in the community was one of veracity and sympathy to the injured and terminally ill, character traits certainly relevant to the animal abuse charges at issue (A-1).

The prosecution objected to Mrs. Eimers' introduction of Ms. Pulci as a character witness solely on the basis of Mrs. Pulci's physical disability, maintaining that her disability would operate only to strike a chord of sympathy in the jury, to the People's disadvantage. The trial court's decision to preclude petitioner's character witness based upon the prosecutor's discriminatory tactics was a violation of Mrs. Eimers' Sixth Amendment right to present a defense and her Fourteenth Amendment due process rights. We ask this court to grant certiorari to review the question of whether Ms. Pulci's testimony was properly excluded.

The Sixth Amendment to the United States Constitution guarantees to a criminal defendant the right of compulsory process

to call witnesses in his favor. As this Court explained in Washington v. State of Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

See also, Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973) ["The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process"].

This right is applicable to the states under the Fourteenth Amendment and is implicated when a defendant is barred from calling witnesses to testify on his behalf. See, Washington v. Texas, supra; People v. Carter, 37 N.Y.2d 234, 239-240, 371 N.Y.S.2d 905, 910 (1975) [". . . the Sixth Amendment to the United States Constitution, obligatory on the States through the due process clause of the Fourteenth Amendment, mandates that the accused has the right to present his own witnesses to establish a defense . . ."]. This Court emphasized that fact in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), noting that:

> Because these [Sixth Amendment] rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed

> by the Fourteenth Amendment to defendants in the criminal courts of the States.

Id. at 818, 95 S.Ct. at 2532 (footnote omitted).

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 1272 (1998); People v. Gilliam, 37 N.Y.2d 722, 374 N.Y.S.2d 616 (1975) rev'g on the dissenting opinion of Justice Hopkins, 45 A.D.2d 744, 356 N.Y.S.2d 663. While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. See, Washington v. Texas, supra, 388 U.S. at 1819, 87 S.Ct. 1920 (1967); see also, Williams v. Florida, 399 U.S. 78, 83 n.14, 90 S.Ct. 1893 (1970). Indeed, the New York Court of Appeals has recognized that federal due process requirements mandate that the testimony of a defendant's witness should not be prospectively excluded unless it is offered in palpably bad faith. People v. Gilliam, supra; see also, People v. Daly, 98 A.D.2d 803, 804, 470 N.Y.S.2d 165, citing Jenkins v. McKeithen, 395 U.S. 411, 429, 89 S.Ct. 1843, 1853 (1969) (citations omitted) ["The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause"].

At the trial court, the judge excluded the testimony of Ms. Pulci based on the People's argument that the defense intended to call Ms. Pulci for the benefit of manipulating the jury and playing on their sympathy in light of her disability. As the Assistant District Attorney stated:

> One of the patients – she probably has somebody terminally ill that's not in a wheelchair. It's all for sympathy. That's all it's meant to do, Your Honor . . . this is a terminally ill paraplegic to illicit sympathy (A-1).

As a general rule, a defendant may introduce "affirmative testimony that the general estimate of his character is so favorable that a jury may infer that he would not be likely to commit the offense charged." Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 219 (1948). As this Court noted in Edgington v. United States, 164 U.S. 361, 363, 17 S.Ct. 72, 72-73 (1896):

> It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crimes with which he is charged.

Proof of good character may be accomplished in the form of reputation evidence summarizing what the witness has heard of the defendant's character in the community. Michelson v. United States, supra, at 477, 69 S.Ct. at 219.

Here, Ms. Pulci would have testified that Mrs. Eimers' reputation in the community was one of veracity and truthfulness and also one of kindness and sympathy to the injured and terminally ill—testimony tending to show that petitioner's character was such that it was unlikely she committed the animal abuse offense charged. Curiously, at the appellate level, the county court affirmed the decision of the trial court and reasoned that Mrs. Eimers' reputation for truthfulness and veracity did not relate to any trait involved in the crime charged even though the prosecution had not objected to Ms. Pulci's testimony on this ground. In addition, the court found that petitioner's reputation did not relate to any trait involved in caring for animals.

The ruling of the County Court was error. Whether a character trait is relevant is determined by asking whether the character trait in question would make any fact of consequence to

the determination of the case more or less probable than it would be without evidence of the trait. Michelson v. United States, supra. Ms. Pulci's proffered testimony was certainly relevant to the character traits at issue during this trial. Petitioner was charged with neglect and maltreatment of animals in her care and her credibility as a witness was in issue. Ms. Pulci's testimony would have apprised the jury of Mrs. Eimers' reputation as a caring and concerned person as well as an honest one and would have placed testimonial evidence before the jury showing that petitioner's reputation in the community was such that it was unlikely that she had committed the charged offense. Edgington v. United States, supra.

Most disturbingly, however, rather than asserting a valid legal objection, the People chose to focus only on how their case would be disadvantaged if a disabled person was allowed to testify for the defense. A prosecutor must be more than an advocate for conviction. He or she is an advocate for justice. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). In exchange for the substantial governmental resources the prosecutor has at his disposal, the system places great trust in the prosecutor to "place the ends of justice above the goal of merely obtaining a conviction." Kirkpatrick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993). Contrary to adhering to his duty to ensure justice is done, the prosecutor in this case sought to preclude an important defense witness simply because she was in a wheelchair. Not only does this render the prosecutor's commitment to fair treatment of the petitioner and the witness suspect, it speaks volumes about the strength of the People's case.

The People engaged in "win at all costs" tactics and, unfortunately, the trial court acquiesced to the prosecutor's bizarre request. The preclusion of the character witness because of her physical disability deprived Mrs. Eimers of both her constitutionally

guaranteed right to present a defense of her choosing and her right to use compulsory process to present an important witness in her favor. Accordingly, these violations of petitioner's rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution warrant the granting of certiorari to remedy deprivations so repugnant to the fundamental rights guaranteed to criminal defendants under the United States Constitution.

POINT II

THE CHARACTER WITNESS' RIGHT TO EQUAL PROTECTION OF THE LAW WAS VIOLATED WHEN SHE WAS DENIED THE RIGHT TO PARTICIPATE IN THE CRIMINAL JUSTICE PROCESS SIMPLY BECAUSE A PROSECUTOR FEARED THAT HER DISABILITIES WOULD CREATE SYMPATHY AMONG THE JURORS WHICH MIGHT PREJUDICE THE PEOPLE'S CASE

The actions of the prosecutor and the trial court also violated the civil rights of the excluded witness, Ms. Pulci. The trial court's preclusion of Ms. Pulci from testifying due solely to the fact that she is confined to a wheelchair infringed upon her right to equal protection under the law.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution specifies that no State may deny any person within its jurisdiction the equal protection of the laws. Likewise, Article 1, §11 of the New York State Constitution provides that:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or

> religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

The New York State Legislature has specifically sought to protect the civil rights of disabled citizens. With the passage of the equal rights provision -- §40-C of the Civil Rights Law -- the Legislature admonished that all persons within the jurisdiction of the state were entitled to equal protection of the laws and specifically provided that:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the Penal Law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state. Civil Rights Law §40-C(2) (emphasis added).

"The term 'civil rights' was understood by the delegates at the 1938 Constitutional Convention to mean 'those rights which pertain to a person by virtue of his citizenship in a state or community.'" People v. Kern, 75 N.Y.2d 638, 651, 555 N.Y.S.2d 647, 653 (1990), quoting, 4 Rev. Record of N.Y. State Constitutional Convention, 1938 (statement of Delegate H.E. Lewis).

The right to be a witness in a criminal action is secured by law. New York State Penal Law §60.20 provides, in relevant part, that "[a]ny person may be a witness in a criminal proceeding unless the Court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence."

Moreover, federal law provides that public entities may not exclude individuals from participation in the activities of government on the basis of a disability. 42 U.S.C. §12132 (the Americans With Disabilities Act). Indeed, this requirement has been specifically applied to the New York State court system. People v. Caldwell, 159 Misc.2d 190, 603 N.Y.S.2d 713, aff'd, ___ A.D.2d ___, 661 N.Y.S.2d 436 (App. Term, 1st Dept. 1997).

Ms. Pulci was denied her right to voluntarily testify on Mrs. Eimers' behalf solely on the basis of her status as a paraplegic. Thus, the action of the trial court, urged by a state prosecutor, deprived her of those civil rights accorded to her by law and denied her the guarantee of equal protection.

The demands of the state and federal equal protection provisions, and sound public policy, mandate the granting of certiorari in this case. The analogy to Batson and its progeny is obvious. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). In Batson, this Court first ruled that exercise of peremptory challenges on the basis of race operated to deprive a criminal defendant of equal protection.

Further, this Court recognized the broad detrimental effects of racial discrimination in jury selection which extend beyond the injury to defendant himself:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try... by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Batson, supra, at 87, 106 S.Ct. at 1718 (citations omitted).

In People v. Kern, supra, the New York Court of Appeals acknowledged the truth of this Batson observation and, in extending Batson to bar racially-based exercise of peremptory challenges by the defense, also provided that a third party could assert a violation of the equal protection rights of a juror. People v. Kern, supra at 654, 555 N.Y.S.2d at 655-56; see also, People v. Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dept. 1990) [male defendant has standing to challenge gender discrimination against female jurors]. The Kern ruling is consistent with this Court's decision in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994) [gender-based exercise of peremptory challenges harms the litigants, the community and the individual jurors -- and violates the Equal Protection Clause].

The same rationale is applicable in the case at bar. Petitioner cannot envision this Court permitting the exclusion of a witness simply because of skin color or gender. Those with disabilities should be treated with the same respect.

Petitioner is entitled to assert Ms. Pulci's right to equal protection of the laws. All of the requirements of third party standing have been met. First, petitioner has a direct interest in achieving vindication of Ms. Pulci's equal protection rights: reversal of her conviction and, ultimately, acquittal after presentation of her complete defense to the jury. See, Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 1370 (1991); People v. Kern, 149 A.D. 2d 187, 234, 545 N.Y.S.2d 4, 33, aff'd 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990).

Second, obstacles exist to Ms. Pulci's ability to vindicate her own rights. NAACP v. Alabama, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170 (1958). In this case, just as with an excluded juror, the discrimination against Ms. Pulci occurred behind closed doors, outside of her presence. Further, since Ms. Pulci was not a party

to the litigation, she was without recourse to complain to the trial court. See also, Powers v. Ohio, 499 U.S. at 411, 111 S.Ct. 1364; People v. Kern, 149 A.D.2d at 234, 545 N.Y.S.2d 33.

Finally, it is unlikely that anyone else will assert Ms. Pulci's constitutional interests. Id. Especially given that the State is the proponent of her exclusion from the judicial process on the basis of her physical disability, this would appear to be the only forum for vindication of her rights. Powers v. Ohio, 499 U.S. at 411, 111 S.Ct. 1364. In light of these circumstances, it is proper for petitioner to seek vindication of the equal protection rights of Ms. Pulci and all others similarly situated.

The disabled are recognized as a protected class in New York State. See, Civil Rights Law §40-C. Indeed, the courts of New York State have recognized that disability should not operate to exclude an individual from participation in the jury process. For example, in People v. Guzman, 76 N.Y.2d 1, 556 N.Y.S.2d 7 (1990), the Court of Appeals ruled that a hearing-impaired person could not be disqualified from service as a juror simply because of his physical disability. Similarly protective of the rights of the disabled, the court in People v. Green, 148 Misc.2d 666 (Westchester Co. 1990), concluded that exercise of a peremptory challenge on the basis of a deaf persons' disability violated the disabled juror's right to equal protection (commenting that such practices would likely run afoul of the Americans With Disabilities Act which, although signed by the President, had not yet come into effect) and allowed assertion of the juror's constitutional interests by the defendant.

There is no reason why the same precepts -- founded upon both federal and state equal protection principles -- should not apply here. The prosecutor's motivation for precluding the witness was premised solely upon her physical disability. Since there was no

evidence demonstrating that she would be incompetent as a witness pursuant to New York CPL §60.20(1), petitioner was entitled to present Ms. Pulci's testimony without concern for the prosecutor's fear that his case might be prejudiced by any potential sympathy effect[2] and the witness was entitled to participate fully in the judicial process by voluntarily testifying in defense of petitioner. The trial court's ruling denied Ms. Pulci equal protection of the law under the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the New York State Constitution by prohibiting her from voluntarily testifying due solely to her disability. The petitioner is entitled to assert a third-party violation of equal protection where the criteria of Powers v. Ohio has been met. Consequently, certiorari should be granted to remedy this unfortunate and egregious denial of federal constitutional protections.

CONCLUSION

The discrimination against the petitioner's character witness on the mere basis of her physical disabilities deprived petitioner of her fundamental Sixth and Fourteenth Amendment rights to present a defense and to compel the testimony of a witness in her favor. The unjustifiable preclusion of Ms. Pulci as a witness simply because she is physically disabled also denied her the equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner respectfully submits that this Court should grant her petition for a writ of certiorari for the purpose of ruling conclusively that a witness may not be precluded from participating

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[2] Indeed, short of precluding a witness because of her physical disability, the prosecutor could simply have asked that the jury be charged that sympathy should play no part in their deliberations.

in the judicial process -- and in a criminal defendant's defense -- simply because she is physically disabled.

Respectfully submitted,

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